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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 627

FRANK E. MONDAY,
Petitioner

v.

THE UNITED STATES

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant a rehearing of its order of February 23, 1960 denying the petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of The United States Court of Claims in the above entitled case as prayed for in the petition filed on January 4, 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

(1) Petitioner asserts that The Court of Claims erred in not holding that petitioner's dismissal of the Department of the Air Force violated the Performance Rating Act of 1950 (5 U.S.C. Sec. 2005). Petitioner received a satisfactory rating in September 1955, less than six months before the charges were filed against him by the Agency on February 21, 1956. There is definite evidence that the

Department of the Air Force started to proceed with a personnel action against the petitioner under the Performance Rating Act rather than under the provisions of the Lloyd-LaFollette Act (5 U.S.C. Sec. 652). Petitioner submits that when the Agency embarked on this line of action, it was legally and morally bound to proceed with the provisions of the Performance Rating Act of 1950 which require under section 2005 that "no officer or employee shall be rated unsatisfactory without a ninety day prior warning and a reasonable opportunity to demonstrate a satisfactory performance." The Agency's failure to follow this procedure was a violation of the Act since it was obligated to proceed on this basis. There has been no decision by this Court on this question of Federal law although there have been decisions in The United States Courts of Appeal including *Thomas* v. *Ward*, 225 F.2d 953 and *Jones* v. *Hobby*, 223 F.2d 345 which petitioner submits were not controlling here.

(2) The action of the Agency was arbitrary and capricious in that petitioner who was employed by the Agency from 1949 to 1956 received efficiency ratings of satisfactory or better. In September 1955, petitioner was given a satisfactory rating for the previous 12 months. During the period from November 1954 to March 1956, petitioner's duties in the Agency were essentially of the same nature. For nearly half of the years covered by the performance rating given to the petitioner in September 1955 petitioner was engaged in doing work for the Agency which he was later charged with doing inefficiently.

Petitioner was prevented at the grievance appeal hearing from presenting fully his grievance by the action of the hearing officer in denying petitioner the right to have his supervisors testify with respect to the same type of work and duties which he performed efficiently.

The Agency's letter of charges was predicated upon the failure of petitioner to meet certain established ob-

jective standards. Yet at the grievance appeal proceeding no standards were established by the Agency on which the alleged norm was based.

Thus it is submitted that the Court of Claims erred in not holding that the Agency was arbitrary and capricious in that the Agency failed to act fairly and acted without substantial cause which was in violation of the spirit and intent of the Lloyd-Lafollette Act and the Agency's own regulations.

CONCLUSION

For the reasons set forth above and in the petition for the writ of certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the United States Court of Claims.

DAVID M. KLINEDINST
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay, and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

DAVID M. KLINEDINST
Attorney for Petitioner